IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 05/03/2004

CORAM

THE HONOURABLE MR.JUSTICE M.CHOCKALINGAM

SECOND APPEAL No.453 of 1991

1. R.James Arulappa
2. R.Devasahayam Arulappa
3. R.Justin Arulappa (minor)
4. R.Xavier Arulappa (minor)
(minors 3 and 4 are represented
by guardian 2nd appellant) .. Appellants

-Vs-

1. C.Arul Thiagaraja
2. C.Hitler .. Respondents

This second appeal is preferred under Sec.100 of the Code of Civil Procedure against the judgment and decree dated 13.11.1990 and made in A.S.No.80 of 1988 on the file of the Sub Court, Nagercoil, reversing the judgment and decree dated 28.4.1987 and made in O.S.No.374 of 19 82 on the file of the Principal District Munsif, Nagercoil.

!For Appellants : MR.AR.L.Sundaresan
Mrs.A.L.Gandhimathi

^For Respondents : Mr.K.M.Abdul Kalam for R1
R2 - No appearance

:JUDGMENT

The defendants in a suit for partition, whose defence though accepted by the trial Court, was rejected by the first appellate Court, which granted a decree in favour of the plaintiffs, have brought forth this second appeal.
2. The following facts are noticed in the pleadings of the parties:
The plaintiffs were the sons of Chellappa, who died on 3.11.1981. The defendants were the sons of Rajappa, the brother of Chellappa. One Arulappa, the grandfather of the plaintiffs, entered into the suit property and converted the said Odai Poramboke into a coconut garden. He obtained a mortgage in respect of the suit properties and adjacent properties. The suit properties were in the possession and enjoyment of Arulappan. The Government granted Kuthagapattom in his name for the suit properties. Arulappa was enjoying the suit property till his death in 1958. During his life time, he executed two Wills in favour of the plaintiffs' father and the defendants'

father. After his death, the properties were in the possession and enjoyment of Chellappa, the plaintiffs' father, and his brother Rajappa. They had planted coconut trees and other trees in the suit properties, and they were in joint possession of the same till 1973. The plaintiffs were entitled to + right in the suit properties. Under the Will, Arulappa authorised his younger son Rajappa to conduct the case in O.S.No.86/58 . Accordingly, the case was conducted and it was decreed. Rajappa and his children do not get any special right under the Will. The defendants had no right to set up possession over the entire suit properties. The defendants were forcibly enjoying the entire properties without any manner of right. Hence, the suit.

3. The suit was vehemently contested by the defendants by stating that Arulappa had neither spent any money on the suit properties nor planted any coconut trees thereon; that during the life time of Arulappa, the defendants' father Rajappa was in exclusive possession of the properties; that neither during the life time of Arulappa nor after his death, the plaintiffs were not in possession of the suit properties; that Chellappa did not plant any coconut trees; that no improvements were made by the plaintiffs' grandfather; that the decree in O.S. No.86/58 was confirmed by the first appellate Court; that Rajappa applied to the Government for grant of patta, and it was, accordingly, granted in his favour; that assuming that the plaintiffs' father Chellappa had any right in the property, such right has been lost by reason of the open and hostile adverse possession of Rajappa from the date of death of Arulappa; that all the trees were planted by Rajappa; that he has also constructed a small shed; that the plaintiffs' father had not contributed a single pie for the improvement of the properties; that the suit is barred by limitation and also hit by Order 2 Rule 2 C.P.C.; that the plaintiffs were not entitled to any reliefs, and hence, the suit was to be dismissed.

4. The trial Court framed the necessary issues, tried the suit and dismissed the same, agreeing with the defence. Aggrieved, the plaintiffs took it on appeal. The first appellate Court reversed the judgment of the trial Court and granted a decree in favour of the plaintiffs. Hence, this second appeal has been brought forth by the defendants in the suit.

5. At the time of admission, the following substantial questions of law were formulated by this Court: (1) Whether the judgment of the lower appellate Court in decreeing the suit for partition of the suit property in favour of the plaintiffs as against the rejection of the same by the trial Court is correct? (2) Whether the lower appellate Court is correct in holding that the suit is not barred by limitation and adverse possession? (3) Whether the lower appellate Court is correct in holding that the suit is not barred by Order 2, Rule 2 C.P.C.?

6. This Court heard the learned Counsel for the appellants and also the learned Counsel for the first respondent on those contentions.

7. After careful consideration of the rival submissions and scrutiny of the available materials, this Court is of the considered view that the appeal carries no merits.

8. Admittedly, the plaintiffs and the defendants are the grandchildren of one Arulappa. The said Arulappa had two sons by names Chellappa and Rajappa. The plaintiffs are the sons of Chellappa, while the defendants are the sons of Rajappa. Arulappa died in 1958 leaving behind his two sons. Both the sons died on 3.11.1981 and in the year 19 80 respectively. Now, the plaintiffs, who are the sons of Chellappa, have brought forth this civil action for division of property against the sons of Rajappa, the defendants herein. It is not in controversy that the suit properties, measuring 45 cents in Survey No.4669/1 and 60 cents in Survey No.4673/1, were odai poramboke; that Arulappa was enjoying the same; that proceedings were initiated against him; that Ex.A3, lease patta list, was given to him; that he filed a suit in O.S.No.37/57 on the file of the District Court, Nagercoil, and the same was transferred to the District Munsif's Court and was renumbered as O.S.No.86/58; and that the said case ended in favour of Arulappa. These facts are evidenced from the documents relied on by the plaintiffs' side and in particular Exs.A6 and A7. Thus, it would be clear that Arulappa came to own the property.

9. According to the plaintiffs, Arulappa executed Ex.A4 Will, on 26.9.1957, wherein he has stated that Rajappa was empowered to carry on the proceedings pending in the Court in O.S.No.37/57, and after the proceedings were over, Rajappa got the patta in his name and continued to be in possession from the time onwards, and on his death, the properties were actually to be divided among the grandchildren of Arulappa, and accordingly, a demand was made; but, the defendants refused for a division, and hence, there arose a necessity for filing the suit. What was all contended by the defendants before the Courts below and equally here also as the appellants, is that neither Chellappa nor his children were in possession of the property at any point of time; that patta was granted in favour of Rajappa, and his children had developed the properties; that originally there was a suit was filed by Chellappa against his brother Rajappa for division of the properties, wherein the present properties were not included, and thus, in view of the provisions under Order 2 Rule 2 C.P.C., the plaintiffs are prevented from seeking for another partition in respect of these properties; and that the trial Court in appreciation of evidence has rightly dismissed the suit; but, the first appellate Court has erroneously reversed the same. This Court is unable to agree with the appellants' contentions either all or any one of them. It is a fact, which is not in controversy, that the properties in question originally belonged to Arulappa, and he had two sons Chellappa and Rajappa, who actually succeeded to the properties on his death; and that he executed a Will under Ex.A4, a perusal of which would clearly indicate that he has empowered his son Rajappa to proceed with the pending case in his place. As rightly pointed out by the learned Counsel for the first respondent/plaintiff, only the power was given to Rajappa under the Will to proceed with the case; but, the properties were not bequeathed in favour of Rajappa thereunder, and thus, the properties should devolve upon the heirs of both sons namely the plaintiffs and the defendants, by operation of law.

10. The contention of the appellants' side that Rajappa was granted patta; that the property has been continuing in his possession, and after him, his children namely the defendants have been in possession, will be of no

avail, since the property originally belonged to Arulappa, the grandfather of both the parties, and hence, the patta should be taken only as one granted in favour of Rajappa on behalf of the members of the family. The next contention of the appellants' side that originally, there was a suit filed by Chellappa against his brother Rajappa in respect of the division of the entire properties, in O. S.No.15/59, and though the properties in question were available and were in the possession of Rajappa, that were not included in the said suit, and hence, the children of Chellappa were prevented from again asking for partition in view of the provisions under Order 2 Rule 2 C.P.C., cannot be countenanced for the simple reason that during the pendency of O.S.No.15/59, filed by Chellappa against Rajappa for partition of the properties, the properties in question were actually involved in a suit, and the proceedings were also pending, and thus, the cause of action for the present suit, seeking division of the properties, has neither arisen nor available for the plaintiffs that time. Needless to say that the cause of action for the second suit, which arose during the pendency of the first suit, was not barred. In such circumstances, all the contentions put forth by the appellants' side do not merit acceptance by the Court.

11. Hence, this second appeal has got to be dismissed as one bereft of substance, and it is, accordingly, dismissed, confirming the judgment and decree of the first appellate Court and leaving the parties to bear their costs.

Index: yes

Internet: yes

To:

1. The Subordinate Judge Nagercoil

2. The Principal District Munsif Nagercoil

3. The Record Keeper V.R. Section High Court, Madras.

nsv/

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